In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-436

NORWOOD J. PATTERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on sixteen counts of failing to make timely deposit of employee withholding taxes to a trust account, in violation of Section 7215 of the Internal Revenue Code of 1954, 26 U.S.C. 7215. He was sentenced to two consecutive five-month terms of imprisonment and fined $7,984. The court of appeals affirmed (Pet. App. A) on July 3, 1972, and rehearing was denied on August 14, 1972. The pe-

tition for a writ of certiorari was filed on September 14, 1972, and thus is out of time under Rule 22(2) of the Rules of this Court.

Beginning prior to 1964 and continuing through 1968, petitioner and his wife owned, directly or indirectly, all the outstanding common stock of Sierra Broadcasting, Inc. ("Sierra") and Radio Station KBIF, Inc. ("KBIF"), and petitioner was the president of both corporations.[1] By 1964, both Sierra and KBIF had become delinquent with respect to their obligation to file employee withholding tax returns and pay over the withheld taxes. Payment was made in full in July 1964, but both corporations again became delinquent in 1965. From the third quarter of 1965 through the end of 1967, only one quarterly return was filed on behalf of Sierra and that return itself was delinquent and was not accompanied by any payment; during the same period KBIF filed only one timely return (several delinquent returns for earlier periods were filed together in May 1967) and made only one payment. By the end of 1967, the cumulative unpaid withholding tax liabilities of the two corporations approached $90,000.[2]

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[1] Petitioner and his wife were also the principal shareholders of Golden Gate Broadcasting, Inc. ("Golden Gate") and Nordawn, Inc. ("Nordawn"), and petitioner was president of those corporations. All four corporations consistently failed to pay, or underpaid, the employee withholding taxes which they collected, but only Sierra and KBIF are involved in this case.

[2] In addition the unpaid withholding tax liabilities of Golden Gate and Nordawn approximated $20,000.

Persistent efforts by the Internal Revenue Service to persuade petitioner, who was responsible for the filing and payment delinquencies of both corporations, to comply with the employee withholding tax requirements were unsuccessful. As a consequence, on November 16, 1967, a Form L-54 was sent to each corporation by certified mail. These forms stated that continued failure to pay over employee withholding taxes might make it necessary to invoke the provisions of Section 7512 of the Internal Revenue Code of 1954; as the forms explained, that Section requires an employer, upon formal notice, to pay over current withholding taxes to a trust account within two business days of the payment of employee wages and provides, in conjunction with Section 7215, that failure to comply is punishable as a misdemeanor.

Petitioner, who admitted receiving the Forms L-54, nevertheless neither contacted the Internal Revenue Service to obtain a hearing or conference concerning the delinquencies and the possible invocation of Section 7512 nor permitted his corporations to fulfill their withholding tax responsibilities. Accordingly, on March 6, 1968, petitioner was personally served, in his capacity as president of the corporations, with two Forms 2481 invoking the provisions of Section 7512. Petitioner at that time indicated that he understood the requirements of that Section and would see that the necessary payments were made.

After service of the Forms 2481 neither corporation made any payments of withholding taxes until May 23, 1968. By that date the two corporations

had failed a total of nine times to make timely payment as required by Section 7512. Throughout June and July withholding tax payments were made promptly, but neither corporation made any of the required payments for August and September, even though there were ample funds available. During this period both corporations regularly paid employees and other creditors. Petitioner was personally responsible for the decisions not to pay the withholding taxes due.

2. Petitioner contends that the absence of any hearing prior to the issuance to him of Form 2481 constitutes a denial of due process which invalidates his subsequent conviction (Pet. 11-17) and that Section 7215 unconstitutionally prescribes imprisonment for debt (Pet. 17-31). These contentions are without merit and warrant no further review.

a. Sections 7215 and 7512 were enacted because of the ineffectiveness of the prior law in securing compliance with the employer's obligation to pay over to the government the money withheld from employees. S. Rep. No. 1182, 85th Cong., 2d Sess. (1958). Section 7512 permits the Internal Revenue Service to require prompt payment over of the current withholding taxes when an employer has failed to make timely payments in the past. The determination of when the imposition of such a requirement is necessary to the effectuation of the Service's responsibility for enforcement and collection is one which is properly left by the statute to the discretion of the Commissioner. Cf. *Phillips* v. *Commissioner*, 283 U.S. 589.

As this Court has often noted, "the requirements of due process frequently vary with the type of proceeding involved * * *." *Hannah* v. *Larche*, 363 U.S. 420, 440. Here there was no factual issue in dispute; it was conceded that petitioner was responsible for the filing of employee withholding tax forms and for the paying over of taxes for both Sierra and KBIF. The only question to be determined was whether special measures were necessary to secure future compliance. Petitioner suggests no reason why a formal hearing should be required for such a determination. Furthermore, petitioner had in fact met with revenue agents on several occasions prior to the issuance of the Form L-54 warning in order to discuss his withholding tax delinquencies. Due process does not demand a hearing at every stage of the administrative proceedings. *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 152-153. Moreover, having previously met with representatives of the Service, petitioner presumably was aware of the opportunity for further conferences. However, during the nearly four-month interval between his receipt of the Form L-54 warning and the issuance of the Form 2481 notices, petitioner did not request a conference to discuss the matter of his withholding tax responsibilities, even though he then knew that his continued failure to fulfill those responsibilities could lead to the invocation of Section 7512.

Section 7512 has been invoked only rarely,[3] and no formal hearing procedures have been established. But as the record in this case illustrates, the informal procedures employed afford ample opportunity for discussion with and presentation of arguments before officials of the Service. In the context of this case due process required no more.

b. As the court below properly observed (Pet. App. 4), petitioner's "argument that he is being imprisoned for debt is specious." Petitioner had collected the withholding taxes and was required to hold them in trust for the United States. 26 U.S.C. 7501(a). Because of petitioner's past failures to satisfy this duty, the Commissioner imposed a special duty to pay over future collections to a special trust account. Petitioner's course of action in continuing his refusal to pay over collected taxes and in using the moneys collected as his own constituted the misdemeanor for which he was convicted. Imprisonment for failure to pay over taxes is not imprisonment for debt. See *Carrollo* v. *United States*, 141 F. 2d 997 (C.A. 8). Cf. *United States ex rel. Griffin* v. *Martin*, 409 F. 2d 1300 (C.A. 2).[4]

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[3] The only other reported decision involving a prosecution under Section 7215 is *United States* v. *Plotkin*, 239 F. Supp. 129 (E.D. Wis.), rejecting the due process contention made by petitioner here.

[4] Although petitioner contends that Section 7215 is inconsistent with 28 U.S.C. 2007, there is no conflict: the latter statute applies only to imprisonment for debt on a writ of execution or other process issued in a *civil* proceeding. See *Freeman* v. *United States*, 217 U.S. 539, 544.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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